No. 10-1

IN THE

Supreme Court of the United States

INTERNATIONAL COMFORT PRODUCTS, LLC,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN RESPONSE

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July 29, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether withdrawal liability owed to a multiemployer pension plan under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1451, may be imposed on a person whose status as an employer derives from an obligation to contribute to the plan under applicable labor-management relations law.

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BRIEF IN RESPONSE

STATEMENT OF THE CASE

Respondents Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, trustee (collectively the "Pension Fund") brought this action against Petitioner International Comfort Products, LLC ("ICP") for collection of withdrawal liability, interest, and penalties incurred as a result of a withdrawal from a multiemployer pension plan. The Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), provides that when an employer withdraws from a multiemployer plan, it must pay "withdrawal liability"

in an amount roughly equal to its proportionate share of the plan's unfunded vested benefits, which is the difference between the present value of a pension plan's assets and the present value of the benefits it will be obligated to pay in the future. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 217, 106 S. Ct. 1018, 1022 (1986); 29 U.S.C. §§ 1381, 1391.

The Pension Fund is a not-for-profit "multi-employer pension plan" within the meaning of 29 U.S.C. § 1002(37). The Pension Fund is primarily funded by contributions remitted by multiple participating employers who contribute to the Pension Fund pursuant to collective bargaining agreements. All principal and income from such contributions and investments thereof are held and used for the exclusive purpose of providing pension benefits to participants and beneficiaries of the Pension Fund and paying the Pension Fund's administrative expenses.

ICP and Top Transportation Services, Inc. ("Top") were subject to an agreement whereby Top agreed to provide certain payroll processing and payroll administration functions with respect to truck drivers employed at ICP ("ICP Agreement"). The truck drivers were subject to collective bargaining agreements executed by Top and Local Union No. 327 of the International Brotherhood of Teamsters ("Local 327") which required pension contributions to the Pension Fund on behalf of the truck drivers based at ICP's manufacturing plant in Lewisburg, Tennessee. Pursuant to ICP's directive, Top was required to execute these collective bargaining agreements.

Top was an Illinois corporation and had its office in suburban Chicago, Illinois. Top was a professional employer organization that entered into co-employment relationships with clients to provide payroll

services, employee benefit services, and related human resource and administrative services.

The relationship between ICP and Top began in 1971 and the most recent ICP Agreement between ICP and Top was executed in 1992. There were no negotiations when the ICP Agreement was signed in 1992, and the execution of the Agreement was a formality. The ICP Agreement was a cost-plus contract with respect to the drivers working at ICP. Pursuant to the ICP Agreement, ICP was responsible for all costs for the truck drivers plus an administrative fee payable to Top. In exchange, Top provided payroll and administrative services related to the drivers. ICP maintained records of the hours worked by the drivers and forwarded this information to Top. Top calculated the drivers' pay and made the appropriate payroll deductions and sent the drivers' pay checks to ICP for distribution to the drivers. Top invoiced ICP for all costs related to the drivers and after receipt of payment from ICP, Top paid the vendor for the related cost. Until ICP was invoiced for the withdrawal liability, ICP had paid all costs related to the drivers.

As stated, the collective bargaining agreements required contributions to the Pension Fund on behalf of the drivers. ICP representatives may have been present during negotiations of the collective bargaining agreements along with Top and Local 327 representatives. ICP retained a copy of the collective bargaining agreements and complied with the terms of the collective bargaining agreements.

ICP determined when and how many drivers to hire and contacted Local 327 or Top to provide candidates. A candidate completed an application at ICP, ICP interviewed the candidate, and ICP made

the final decision whether to hire the candidate. ICP determined whether there would be layoffs of drivers and followed union seniority for layoffs and recalls. After a driver was hired, both ICP and Top maintained a file for the driver. ICP representatives signed documents with respect to the drivers under which ICP was identified as the employer and the ICP representatives identified themselves as the manager or as the company representatives of the driver.

ICP was responsible for the decision to fire drivers and could bar drivers from ICP premises. ICP investigated and handled potential disciplinary matters related to the drivers. Any grievances raised by Local 327 were filed with ICP and grievance hearings were held with representatives from Top, ICP and Local 327, and ICP and Top made a joint decision on the disciplinary action against the driver.

Drivers could not refuse ICP assignments and could not work for other companies. ICP was responsible for safety issues related to the drivers and held meetings with the drivers 2-3 times per year. The drivers contacted ICP supervisors if they had a problem such as an accident or injury. ICP kept injury reports for workers compensation issues. ICP was responsible for initiating any drug test or driver physical. ICP maintained the time sheets and hours worked for the drivers and forwarded this information to Top. ICP handled driver vacation and sick time.

Top's main representative assigned to deal with ICP was Robert Hyman. Mr. Hyman lived in North Carolina and all other Top representatives were located in the suburbs outside Chicago, Illinois. Neither Mr. Hyman nor any other Top representative

was on-site at ICP to handle day-to-day matters and Mr. Hyman visited ICP only every few months.

In November 2001, ICP informed Top that ICP was terminating the ICP Agreement effective February 2002. ICP hired a non-union company to perform the work and Top was not given any opportunity to negotiate a better agreement. By letter dated December 13, 2001, ICP notified the drivers that the letter was "written notification of termination of employment with Top Transportation and International Comfort Products."

Top ceased operations as a result of ICP's termination of the ICP Agreement. On March 2, 2002, Top permanently ceased to have an obligation to contribute to the Pension Fund, thereby effecting a "complete withdrawal," as defined by 29 U.S.C. § 1383. As a result of this complete withdrawal, Top incurred withdrawal liability to the Pension Fund in the amount of $570,694.35 as determined under 29 U.S.C. § 1381(b). The Pension Fund filed a lawsuit against Top to collect the withdrawal liability. However, after obtaining a judgment against Top, that judgment proved to be uncollectible.

The Pension Fund brought this action against ICP for collection of the withdrawal liability owed to the Pension Fund under various theories of liability, including that ICP, as an employer or joint employer with Top, was obligated to contribute to the Pension Fund pursuant to applicable labor-management relations law. ICP disputed that it was a joint employer because it did not sign the applicable collective bargaining agreements. The district court granted summary judgment in favor of ICP ruling that regardless of whether ICP was a joint employer with Top under labor law, ICP could not be liable for the

withdrawal liability because ICP was not contractually bound to make contributions to the Pension Fund.

The Pension Fund appealed the district court's judgment to the United States Court of Appeals for the Sixth Circuit. On appeal, the Sixth Circuit held that the district court erred in holding that the basis for imposing withdrawal liability on an employer must arise from a contractual obligation to contribute. App. at 10a. In reaching this conclusion, the Sixth Circuit relied on both the statutory language and this Court's precedent. The Sixth Circuit noted that MPPAA provides that an "obligation to contribute" may arise in one of two ways. App. at 8a-9a. First, an obligation to contribute may arise under the terms of a collective bargaining agreement. 29 U.S.C. § 1392(a)(1). Second, it may arise as a result of a duty under applicable labor-management relations law. 29 U.S.C. § 1392(a)(2). Given that the statutory definition of "obligation to contribute" includes a duty that arises by virtue of contract or a duty arising under labor law, the Sixth Circuit held that the statutory language was inconsistent with the holdings of other circuits that limited withdrawal liability to those entities whose obligation to contribute arose from a contractual duty.

As further support for its ruling, the Sixth Circuit relied on this Court's decision in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S. Ct. 830 (1988); App. at 9a-10a. In that case, this Court stated "[t]hat [the] term [obligation to contribute] is defined for the purposes of the withdrawal liability portion of the statute in language that unambiguously includes both the employer's contractual obligations and any

obligation imposed by the NLRA." 484 U.S. at 545-46, 108 S. Ct. at 834. Thus, relying on both the statutory language and this Court's decision in *Laborers*, the Sixth Circuit declined to follow the "mere accumulation of contrary precedent" in other circuits, and vacated and remanded the case for a determination by the district court as to whether an obligation to contribute existed under labor law. App. at 10a. ICP's petition for rehearing en banc was denied.

REASONS FOR GRANTING THE PETITION

The Pension Fund agrees with ICP that the petition for a writ of certiorari should be granted by this Court, although the Pension Fund disagrees with ICP as to the proper resolution of the question presented. The petition should be granted to resolve the split between the courts of appeals as to whether the imposition of withdrawal liability on an entity must be derived from an underlying contractual obligation to contribute or whether an obligation to contribute under labor law will suffice. Similarly, the petition should be granted to ensure conformity with this Court's prior decision in *Laborers*. Also, the petition should be granted to ensure that ERISA and MPPAA are applied uniformly throughout the country. Finally, the petition should be granted to resolve an important issue of federal law.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT IN THE COURTS OF APPEALS.

The Sixth Circuit's decision in this case conflicts with prior decisions of the Seventh, Eighth, and Ninth Circuits. *Compare Cent. States, Se. & Sw. Areas Pension Fund v. Int'l Comfort Prods., LLC*, 585

F.3d 281, 287 (6th Cir. 2009) (withdrawal liability may be based upon obligation to contribute arising under labor law) *with Transpersonnel v. Roadway*, 422 F.3d 456, 460 (7th Cir. 2005) (obligation to contribute must be based on contract); *Rheem v. Cent. States, Se. & Sw. Areas Pension Fund*, 63 F.3d 703, 707 (8th Cir. 1995) (same); *and H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for N. Cal.*, 859 F.2d 808, 813 (9th Cir. 1988) (same). The Sixth Circuit acknowledged that its decision on the question presented differed from other circuits. App. at 10a. This clear circuit split warrants the granting of the petition to resolve the issue.

Unlike the other circuits, the Sixth Circuit did not disregard the definition of "obligation to contribute" as defined under MPPAA. That definition provides that an obligation to contribute arises: "(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law...." 29 U.S.C. § 1392(a). The Sixth Circuit emphasized the critical distinction between the definition of "obligation to contribute" in the withdrawal liability context, and the definition of "obligation to contribute" in the delinquent contribution context. *Compare* 29 U.S.C. § 1145 (specifically excluding an obligation arising under labor law) with 29 U.S.C. § 1392(a) (specifically including an obligation arising under labor law). *Int'l Comfort Prods.*, 585 F.3d at 285-86.

The decision in *Laborers* supports the distinction emphasized by the Sixth Circuit. In *Laborers*, this Court rejected an attempt by a fund to collect delinquent contributions under 29 U.S.C. § 1145 based upon a duty arising under labor law. In rejecting the claim that a contribution delinquency based on a

labor law duty was enforceable under 29 U.S.C. § 1145, the Court stated that 29 U.S.C. § 1392(a) "makes clear that while withdrawal liability may arise from both contractual and statutory duties, § 515 [29 U.S.C. § 1145] provides only for a contractual origin for delinquency liability." *Laborers*, 484 U.S. at 545-46, 108 S. Ct. at 834.

The Sixth Circuit correctly applied MPPAA when it determined that an obligation to contribute may arise from a duty under labor law and the Sixth Circuit's decision is consistent with this Court's decision in *Laborers*. Withdrawal liability is incurred when an "employer" withdraws from a plan. 29 U.S.C. § 1381(a). The Sixth Circuit agrees with the other circuits that the definition of an "employer" in ERISA, although not directly applicable to MPPAA, should be used. That definition provides that an "employer" is "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." 29 U.S.C. § 1002(5).

The Sixth Circuit's decision correctly interprets the statutory language and this Court's precedent. Only a decision by this Court can resolve the circuit split and maintain uniformity on this important issue of federal law.

II. THE PETITION SHOULD BE GRANTED TO ENSURE CONFORMITY WITH THIS COURT'S PRIOR PRECEDENT.

In *Laborers*, this Court explicitly stated that an obligation to contribute for withdrawal liability purposes includes not only a duty created by contract but also a duty arising under labor law. 484 U.S. at 545-46, 108 S. Ct. at 834. The Sixth Circuit faithfully

applied this precedent. However, none of the other circuits resolving the question presented explained how their holdings could be harmonized with *Laborers*. The conflict between *Laborers* and the decisions of the Seventh, Eighth, and Ninth Circuits warrants granting the petition.

III. THE PETITION SHOULD BE GRANTED TO ENSURE THAT ERISA AND MPPAA ARE APPLIED UNIFORMLY.

There are more than 10.4 million individuals covered by approximately 1,500 multiemployer plans. Pension Benefit Guar. Corp. Annual Report 2009 at 13, http://www.pbgc.gov/docs/2009_annual_report.pdf (last visited July 19, 2010). The Pension Fund has over 2,000 participating employers and over 400,000 participants. The participating employers are located in numerous states in many circuits. Venue for withdrawal liability actions lies in the district "where the plan is administered or where a defendant resides or does business." 29 U.S.C. § 1451(d). As a result, conflicting decisions among the courts of appeals results in a multiemployer plan being subject to differing rules depending upon the circuit in which the plan is administered or where a participating employer does business. Employers participating in the same multiemployer plan may be subject to different rules simply because those employers do business in different circuits. This is contrary to the goal of applying ERISA and MPPAA in a uniform manner. As a result, the Court should grant the petition so that both multiemployer plans and participating employers know their rights and obligations.

IV. THE PETITION SHOULD BE GRANTED TO RESOLVE AN IMPORTANT ISSUE OF LAW.

Congress found that multiemployer pension plans "are affected with a national public interest," that the "continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer plans," and that "withdrawals of contributing employers ... frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries and labor-management relations." 29 U.S.C. § 1001a. In other words, "Congress enacted the MPPAA to protect the financial solvency of multiemployer pension plans." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 196, 118 S. Ct. 542, 546 (1997). To help protect the plan's financial solvency, MPPAA requires employers to pay withdrawal liability to ensure that the participants in the plan receive the promised pensions. *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416-17, 115 S. Ct. 981, 985 (1995).

MPPAA's definition of "obligation to contribute" which includes not only an obligation to contribute under the terms of a collective bargaining agreement but also an obligation to contribute under labor law, 29 U.S.C. § 1392(a), helps to ensure that a multiemployer plan collects all of the withdrawal liability due to it. Ultimately, protecting the solvency of multiemployer plans through the collection of withdrawal liability not only helps fund the payment of the promised pensions to the participants, but also increases the likelihood that the financial burden

"will not be shifted to the other employers in the plan and, ultimately, to the Pension Benefit Guaranty Corporation, which insures such benefits." *Cent. States, Se. & Sw. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1371 (7th Cir. 1992). Thus, the question presented is an important issue of law whose resolution affects not only the plans themselves, but also the participants, the participating employers, and the Pension Benefit Guaranty Corporation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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